

**PX13**

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI  
SIXTEENTH JUDICIAL CIRCUIT, DIVISION 12  
Honorable Jennifer M. Phillips, Judge**

KATHERINE O' HAVER, )  
                        )  
                        Plaintiff, )  
                        )  
                        vs.         )      Case No. 1816-CV30710  
                        )  
3M COMPANY,            )  
                        )  
                        Defendant. )

**TRIAL TRANSCRIPT**

Beginning on September 27, 2022 through and including October 13, 2022, the above cause came on for jury trial before the Honorable Jennifer M. Phillips of the Circuit Court of Division 12 of the Jackson County Circuit Court in Kansas City, Missouri.

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Sixteenth Judicial Circuit, Division 6  
Kansas City, Missouri

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[REPORTER'S NOTE: This transcript contains quoted material.

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1           3M acted willfully and wantonly in a number of manners with  
2 respect to the Bair Hugger including relying on its legal  
3 department rather than its clinical affairs people in  
4 conducting critical safety testing and failing to  
5 adequately test and intentionally withholding information  
6 from healthcare providers and others that put plaintiff and  
7 others at a severe risk of harm. We would ask that we be  
8 permitted to provide evidence by way of a stipulation to  
9 the jury regarding 3M's net worth.

10           THE COURT: Any argument from defendant regarding  
11 the submission of punitive damages?

12           MR. BLACKWELL: Yes, Your Honor. We think that  
13 would be improper in this case based on the evidence that  
14 the jury has heard. There's been zero evidence that any  
15 particle admitted from the Bair Hugger contains bacteria.

16           And there have been no studies presented by the  
17 plaintiffs that conclude that there is a causal nexus  
18 between use and operation of the Bair Hugger and surgical  
19 site infections.

20           So not only is the science lacking. It provides no  
21 basis for the idea that 3M acted with a willful, reckless  
22 or wanton indifference to the rights and safety of others,  
23 Your Honor.

24           THE COURT: Okay. The Court finds that  
25 sufficient evidence has been proven to allow the submission

1                   of punitive damages to the jury.

2                   So now the stipulation.

3                   MR. EMISON: Yes, Your Honor. Plaintiffs have  
4                   proposed and provided to Counsel for defendant a combined  
5                   stipulation that includes both the matter of predecessor  
6                   liability which was previously stipulated to and the amount  
7                   of defendant's net worth as of December 31, 2021 as  
8                   reflected in its official SCC filing.

9                   THE COURT: Do you guys want to mark this as an  
10                  exhibit?

11                  MR. EMISON: I can, yes, Your Honor.

12                  THE COURT: Do you want to use 2230? Let's go  
13                  off the record.

14 (OFF THE RECORD.)

15 (BACK ON THE RECORD.)

16                  MR. EMISON: How about 2231?

17                  THE COURT: I understand, Mr. Torline, the  
18                  defendant has an objection generally to punitive damages.  
19                  Do you have an objection to Plaintiff's Exhibit 2231, the  
20                  stipulation?

21                  MR. TORLINE: Yes, Your Honor, on two bases.  
22                  Number one, on the stipulation as to the successor  
23                  liability. The evidence is clear in this case from voir  
24                  dire, it was mentioned in opening. Mr. Emison mentioned it  
25                  and there's been significant evidence that 3M is the

1           3M is moving for a directed verdict on three bases.

2           First, we move for directed verdict on the claims that  
3           the plaintiff initially submitted but are no longer going  
4           to pursue. And we move for directed verdict on the  
5           remaining claims in that essential elements are lacking.

6           We would also move for a directed verdict on the  
7           punitive damages. With respect to abandoned claims, Your  
8           Honor, the claims that have not been pursued in this trial.  
9           That would include the plaintiff's warranty claim, Counts 4  
10          and 5.

11           THE COURT: I'm just going to interrupt you just  
12          so that we don't spend time talking about counts that are  
13          no longer in play. Mr. Emison, I have - well I had a total  
14          of 13 counts. Ten through 13 it's my understanding  
15          involved the defendants that have since been dismissed.

16           So 1 through and including 9 are the ones as it  
17          relates to defendant 3M. Is the plaintiff intending to  
18          submit on all nine counts?

19           MR. EMISON: No, Your Honor. Plaintiff does not  
20          intend to submit on express warranty which I believe  
21          assuming this is correct, Count 4; breach of implied  
22          warning, Count 5; violation of the MMPA, Count 6; negligent  
23          misrepresentation, Count 7; fraudulent misrepresentation,  
24          Count 8 and fraudulent concealment, Count 9.

25           THE COURT: Okay. So it looks like Counts 1

1       through 3 are the ones that the plaintiff intends to submit  
2       to the jury?

3                    MR. EMISON: Negligent design and failure to  
4       warn.

5                    THE COURT: Yes, okay. With that, I didn't  
6       want you to waste your five minutes on counts that didn't  
7       matter anymore.

8                    MR. BLACKWELL: Thank you, Your Honor. With  
9       respect to the design defect claims, very simply according  
10      to the case of *Johnson versus Auto Handling Corporation* 523  
11      S.W.3d at page 466. It's clear that in order for plaintiff  
12      to proceed on any claims that are rooted in design defects  
13      there must have been testimony and there must have been  
14      evidence that the product was in substantially the same  
15      condition at the relevant times of the lawsuit, the time of  
16      injury as when it was delivered.

17                  In this case there has been - in this trial there's  
18      been zero testimony and zero evidence as to the condition  
19      of the product and that they have presented no evidence  
20      whatsoever. That's at the root of foundation for pursuing  
21      a design defect claim.

22                  For the failure to warn claim, plaintiffs had to have  
23      shown not only that the product lacked a warning but caused  
24      an injury but they must have shown that the warning  
25      would've altered behavior.

1           In this case there's been no testimony at all from a  
2 person who would be making decisions in Ms. O'Haver's  
3 operating room about the use of the Bair Hugger who has  
4 testified at all, let alone that whatever the warning  
5 plaintiffs might claim would have altered behavior.

6           We heard from Dr. Ballard. Dr. Ballard was very clear  
7 and it's cited in our papers that he is not the person who  
8 would make the decision about the use of a patient warming  
9 device. It would be the anesthesiologist.

10          As Your Honor knows, we didn't hear anything from Dr.  
11 Bible in the case at all, the anesthesiologist.

12          We heard from a corporate representative who's a  
13 marketing person, not a person who's in a position to make  
14 any decisions about whether or not the type of patient  
15 warming is used or not the operating room.

16          To the extent plaintiff's claim that there is a  
17 rebuttal of presumption that applies, that means they don't  
18 have to show that the warning would've altered behavior,  
19 it's questionable, Your Honor, under Missouri law whether  
20 that applies to a intervenor in the first place. And we  
21 think there is no jury question in that regard when the  
22 person who had been making the decisions, the  
23 anesthesiologist did not testify in the trial nor was there  
24 any evidence related to what the anesthesiologist either  
25 knew or didn't know which is important even for the

1           rebuttal of presumption. You have to show that the warning  
2 information - the warning would've made a difference as in  
3 they told them something they didn't know and then that  
4 would've altered the behavior.

5           The persons not even identified here. There's been no  
6 testimony of any kind. And for that reason, no basis for  
7 the failure to warn claim, Your Honor, should go forward.

8           We've heard the Court's ruling already with respect to  
9 punitives. I won't take much time other than to say we  
10 think the evidence doesn't show an indifference let alone a  
11 complete indifference or conscious disregard. And that's  
12 based upon everything from the Bair Hugger not emitting any  
13 bacteria containing particulates; doesn't increase the  
14 bacterial load in the operating room, Your Honor, and none  
15 of the studies that plaintiffs have relied upon and shown  
16 the jury conclude causation.

17           THE COURT:       Thank you, Counsel. Mr. Emison.

18           MR. EMISON: Yes, Your Honor, just very, very  
19 briefly. I know the Court has been paying very close  
20 attention to the evidence as it comes in so I won't belabor  
21 any of this. But I will just say that none of the  
22 essential elements are lacking.

23           There was evidence that the jury heard today, in fact,  
24 from Ms. Colby from CenterPoint Hospital about the Bair  
25 Hugger and how 3M maintained ownership and control of the

1           Bair Hugger devices that were at the hospital and had the  
2 responsibility for maintaining those. That satisfies our  
3 element that it was in substantially the same condition.  
4 If they weren't in substantially the condition, if they  
5 were not in working order she testified that they would get  
6 a different new model to replace the nonworking model.

7           With regard to the warnings, Dr. Ballard - the  
8 testimony that's cited isn't accurate. Dr. Ballard - all  
9 that establishes is Dr. Ballard does not place the Bair  
10 Hugger on the patient. Dr. Ballard controls his operating  
11 room. He very clearly testified that if he wanted to know  
12 the information that 3M had not told him, the warning was  
13 not given to make an informed decision about whether or not  
14 to use the Bair Hugger in his surgeries.

15           And we also heard that same testimony from Ms. Colby  
16 today for the hospital who said that she relied on 3M to  
17 provide proper warnings about the risks and benefits so the  
18 hospital could make an informed decision about what forced  
19 air warming devices to provide to its healthcare providers.

20           Other than that, we would stand on our evidence, Your  
21 Honor.

22           THE COURT: The defendant 3M's Motion for  
23 Directed Verdict at the Close of Plaintiff's Evidence is  
24 overruled. Noting that, given that the plaintiff has only  
25 indicated that they are going to submit on the three

1                   the close of all the evidence?

2                   MR. TORLINE: Yes, Your Honor. We want to renew  
3                   and raise our Motion to Judgment at the Close of All  
4                   Evidence.

5                   THE COURT: Do you have a paper copy for me?

6                   MR. TORLINE: I do not.

7                   THE COURT: No worries.

8                   MR. TORLINE: We're incorporating with our  
9                   Motion for Directed Verdict. And, again, Judge, I would  
10                  just point out that there's been no evidence or expert  
11                  testimony that establishes causation as opposed with  
12                  correlation. The medical literature is, as we've seen, is  
13                  frankly all over the board. We think that there is not a  
14                  case - a submissible case for punitive damages. There is  
15                  no - the heating presumption has been overcome. Dr. Bible  
16                  was not called and he's not testified so there's no  
17                  evidence that ...

18                  THE COURT: Hey, guys in the gallery, we're  
19                  trying to make a record so if you could keep your voices  
20                  down, I'd appreciate it. Mr. Torline.

21                  MR. TORLINE: That he would've heeded any warning  
22                  and done anything differently than what he did. We will  
23                  stand on the papers that we filed.

24                  THE COURT: Stand on your evidence and on your  
25                  response, Mr. Emison.

1                   MR. EMISON: No. We stand on our evidence. I  
2 would incorporate the additional argument that I made at  
3 the close of arguments.

4                   THE COURT: That defendant's Motion for Directed  
5 Verdict at the Closed of All the Evidence will be  
6 overruled. Mr. Torline, did you have any other motions  
7 that you wanted to make?

8                   MR. TORLINE: Yes, Your Honor. We want to file  
9 that in open court our Motion for Mistrial.

10                  THE COURT: Okay. And is this the previous oral  
11 Motion for Mistrial or is this based upon new grounds?

12                  MR. TORLINE: I'm trying to remember what the  
13 original ...

14                  THE COURT: I'm think we had at least one or  
15 two requests to a mistrial. I can't remember.

16                  MR. BLACKWELL: It's additional grounds.

17                  MR. TORLINE: Judge, what we have done here is  
18 the basis of this is number one, the deposition transcripts  
19 that - the snippets that were played cumulatively over the  
20 last three weeks, by my count there were over 24 snippets  
21 played in the plaintiff's case in chief. The plaintiff  
22 relies on 5707 which says "Deposition can be used for any  
23 reason," which is true. It does say that. But it also  
24 says, "Any part of the deposition that is admissible under  
25 the rule as though the deponent were testifying in court."